Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

ORAZIO STANTINI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether it Is Constitutional Error to Sentence a Defendant under a Federal Sentencing Guideline for First Degree Premeditated Murder Where the Indictment Charged Second Degree, Non-premeditated Murder and the Jury Was Instructed Only to Consider Second Degree Murder and Not to Consider Premeditation and it Violates the Rule Established in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) for a Circuit Court to Deny a Certificate of Appealability Where the Defendant under 28 U.S.C. §2255 Has Raised this and Other Significant Constitutional Issues over Which There Is a Direct Split of Authority among the Circuits and Within the Reviewing Circuit Itself?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Robert Bisaccia was the only other party before the trial court and the court of appeals in this case.

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OPINIONS BELOW

The decision of the court of appeals denying Mr. Stantini's application for a Certificate of Appealability ("COA") was a one page summary order without any analysis (A-1-A-2). The decision from the district court denying the application for a COA is reported at *Stantini v. US*, 268 F. Supp. 2d 168 (E.D.N.Y. 2003)(A-3-A-38) and an additional decision from the district court relevant to the issues raised herein is reported at *Stantini v. US*, 2000 U.S. LEXIS App. 7231 (E.D.N.Y., April 12, 2003)(A-39-A-82).[1]

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision denying Mr. Stantini's application for a COA in this case on February 11, 2004. Mr. Stantini filed a motion for an extension of time for the filing of this Petition and this Court extended the time to file this petition until July 12, 2004.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)[3] and this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part, "No person shall be held to answer for a capital, or other infamous crime, unless on a

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[1]Mr. Stantini's case in the district court was consolidated with the §2255 petition filed by his co-defendant, Robert Bisaccia. Mr. Bisaccia is filing his own petition for a writ of *certiorari*. Mr. Stantini joins in that petition to the extent the same applies to him and is not inconsistent with the arguments herein advanced.

[2]Mr. Stantini filed a second motion for an extension of time following the release by this Court of its decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573 (June 24, 2004), in order to file a motion in the Second Circuit requesting a recall of the mandate for a consideration of the impact of that directly relevant decision; however, the motion was returned because the rules prohibit an extension of time beyond 60 days.

[3]*See also Hohn v. US*, 524 U.S. 236 (1998).

presentment or indictment of a Grand Jury *** nor shall any person *** be deprived of life, liberty, or property, without due process of law ***."

Amendment VI to the Constitution of the United States provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *** and to be informed of the nature and cause of the accusation; *** and to have the Assistance of Counsel for his defense."

Article I, Section 9(3) of the Constitution of the United States provides, in relevant part, "No *** ex post facto Law shall be passed."

STATEMENT OF THE CASE

A. Procedural History

On November 26, 1993, a jury in the Eastern District of New York returned a verdict of guilty against Mr. Orazio Stantini of having a role in a racketeering conspiracy to commit murder and the 1988 murder of Francesco Oliveri. On April 18, 1995, a motion for a new trial and to set aside the conviction was denied and on June 15, 1995, Mr. Stantini was sentenced to 27 years in prison. On May 24, 1996, his judgment of conviction and sentence was affirmed by the United States Court of Appeals for the Second Circuit.

On June 20, 1997, Mr. Stantini filed a *pro se* motion to vacate his judgment of conviction and sentence pursuant to 28 U.S.C. §2255. On December 11, 1997, the district court entered an order erroneously dismissing Mr. Stantini's §2255 motion. On March 5, 1998, the Second Circuit reversed his decision, remanding the case for litigation of the §2255 motion. On remand, the undersigned entered the case as counsel for Mr. Stantini and advised the Court that the *pro se* filing had to be amended, that new information had been developed through an in depth investigation, and the undersigned requested an opportunity to file additional pleadings setting out fully the claims for relief. The undersigned also filed a motion for recusal, noting evidence that required the recusal of the district judge, based on his

previously undisclosed involvement in plea negotiations with the government's sole witness against Mr. Stantini, the court's further involvement with that witness, and the court's personal and undisclosed knowledge of the conflicts of interests under which trial and appellate counsel had been operating. The district court was asked to rule on the recusal motion and permit a review of any adverse ruling on recusal through Mandamus before any further action was taken in the case. The district judge ignored these requests and, without further notice and with only some of the issues having been raised and developed, after sitting on the case without action for two years, entered an order on April 12, 2000, denying all claims for relief brought in the *pro se* §2255 motion. (A-39-A-82)

On May 2, 2000, Mr. Stantini filed a motion to reconsider under Rules 59(e) and 60 of the Federal Rules of Civil Procedure. On September 21, 2000, the district court dismissed that motion. On August 21, 2001, the Second Circuit again reversed, remanding the case for further proceedings; but the district court ignored all submissions and did nothing.

On June 16, 2003, two and one-half years after final briefing on Mr. Stantini's request for a Certificate of Appealability ("COA"), and only after Mr. Stantini filed a *pro se* Mandamus petition in the Second Circuit forcing some action by the district court, the district court entered its order denying the COA and denying the Rule 60(b) motion, in a decision filled with errors about the procedural history of the case, completely mischaracterizing Mr. Stantini's claims and record facts, and ignoring several fundamental applicable principles of law, including the applicable standard for the evaluation of a request for a Certificate of Appealability. (A-3-A-38)

On February 11, 2004, the Second Circuit summarily denied Mr. Stantini's application to that court for a Certificate of Appealability without any analysis whatsoever of the significant constitutional issues raised in this case, including issues on which there is a direct split among the

federal circuits and issues which absolutely required an evidentiary hearing. (A-1-A-2)

B. Facts material to the consideration of the questions presented

Mr. Stantini was represented at his trial by attorney Charles Carnesi. At the same time, Carnesi represented a defendant, Mannino, who was charged (along with others), in the Southern District of New York, with the same racketeering murder of Oliveri.

Following the conviction, Mr. Stantini, now represented by new counsel, Alan S. Futerfas, filed a motion for a new trial and to vacate the conviction in his case based, primarily, on a conflict of interests which attended Mr. Carnesi's representation of Mr. Stantini at trial. The specific (and only) conflict of interests cited by Futerfas was the fact that Carnesi, while representing Stantini, simultaneously represented Mannino in the Southern District case. During the course of his trial, Mr. Stantini had been offered a plea deal which provided for a ten year prison sentence. He expressed to Carnesi that he could not accept that deal because of the potential negative impact it could have on Carnesi's other client, Mannino. Carnesi did nothing to dissuade Mr. Stantini of that concern, despite knowing that Mannino at that time already had decided to plead guilty and that he (Carnesi) was in the process of negotiating the terms of that deal.[4]

On April 18, 1995, a year after the post-trial motion was filed, Judge Glasser denied Mr. Stantini's motion and set the case for sentencing. On June 15, 1995, Mr. Stantini was

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[4]The district court missed this fact entirely, notwithstanding an affidavit from previous government counsel reflecting the same. Instead, the lower court found, contrary to the record that Mannino was "retried" on the charge after Mr. Stantini's conviction. (A-5) In truth, Mannino and all of his co-defendants entered guilty pleas to the Oliveri murder and to other charges and received a sentence of approximately half of the time Mr. Stantini received, notwithstanding his "minor role" as found by the lower court in this case.

sentenced to 27 years in prison. Mr. Stantini had no significant criminal history.

Mr. Stantini was sentenced under U.S.S.G. §2A1.1, the Guideline applicable to First Degree premeditated Murder, rather than under §2A1.2, the Guideline for Second Degree non-premeditated Murder, notwithstanding the facts that (1) the underlying offense charged in the indictment was **Second Degree non-premeditated** Murder and (2)the jury expressly was instructed **not** to consider "premeditation" because it was not an element of the crime. Moreover, the district court used a version of §2A1.1 which was not even in effect at the time of the alleged crime, notwithstanding the fact that the probation office in the same district in a prior case involving the same defense lawyers and prosecutor already had issued a report for the district advising that §2A1.1 **could not** be applied to a pre-November 1, 1990 non-premeditated murder. The defense lawyers raised no objection and only acknowledged their error in connection with the §2255 investigation. The effect was to subject Mr. Stantini to a sentence at Guidelines level 41 (324-405 months) instead of 31 (108-135 months).

Mr. Futerfas represented Mr. Stantini on his direct appeal from the judgment of conviction and sentence, primarily raising the issue of Carnesi's conflict of interests. Based, in significant part on a finding that Mr. Futerfas had made virtually no showing in support of the conflict issue, the court of appeals rejected the appeal, and on May 14, 1996, affirmed the conviction and sentence. *See US v. Stantini*, 85 F.3d 9, 16-17 (2^{d} Cir. 1996)(noting the "conspicuous absen(ce)" from Futerfas's affidavit of the relevant facts related to the issue of Carnesi's conflict and the adverse effect it caused).

On June 20, 1997, Mr. Stantini timely filed a *pro se* motion to vacate his judgment of conviction and sentence pursuant to 28 U.S.C. §2255. As noted above, the district court erroneously dismissed the motion; but the Second Circuit reversed and remanded.

Although the district court knew that Mr. Stantini was

now represented by counsel, the court ordered the government to file a response to the *pro se* papers, permitting Mr. Stantini only to reply to the government's submission.

On June 19, 1998, before the government filed its memorandum of law, the undersigned wrote to the district court judge raising certain important substantive and procedural issues in the case. Specifically, the undersigned advised the district court that a lot more information had been uncovered about Mr. Carnesi's conflicts of interests while representing Mr. Stantini and information had been uncovered which demonstrated that Mr. Stantini's appellate attorney, Futerfas, who had been hired specifically to raise the Carnesi conflicts, himself had operated under major conflicts of interests directly related to his relationship with Carnesi and Mannino, none of which ever was disclosed to Mr. Stantini.

Futerfas and Carnesi provided affidavits admitting to some of the new facts we learned and confirming Mr. Stantini's averments that he did not know about the conflicts and, to the extent each was not willing to put the most inculpatory information in an affidavit, they both affirmatively agreed that they would testify on those subjects at a hearing if one were held.

Specifically, it was brought to the district court's attention that Carnesi had been disqualified in the Southern District of New York from representing Mannino in connection with the Oliveri murder because he (Carnesi) had been implicated in the defendants' underlying crimes. We learned further that Mr. Futerfas actually had represented Carnesi in that case and that it was through Mr. Futerfas's representation of Carnesi that Carnesi eventually (after a period of well over a year) was permitted to re-enter the Mannino case as counsel. We also learned that Futerfas also represented Mannino as co-counsel with Carnesi throughout the Mannino case.[5]

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[5]Here again, the lower court ignored the facts demonstrated by the record and made its own findings to the contrary, directly against the undisputed facts, and without any evidentiary basis. The court found that

On April 12, 2000, the district court entered a memorandum and order denying out of hand all of Mr. Stantini's claims without providing an opportunity for any discovery and without providing any evidentiary hearing or any other kind of hearing or argument whatsoever. In doing so, the district court ignored all of Mr. Stantini's requests that it decide the pending recusal motion before addressing any substantive issues in the case, as well as Mr. Stantini's requests that he be permitted to fully brief all substantive issues and further flesh out the issues he had raised *pro se* after the recusal motion was decided.

On May 2, 2000, Mr. Stantini filed a motion for reconsideration under FRCP 60(b). On September 21, 2000, the district court dismissed this motion; but on August 21, 2001, the Second Circuit reversed and remanded. Meanwhile, based upon the schedule set in the district court, Mr. Stantini filed his Motion for a Certificate of Appealability in the district court, on November 6, 2000, while the Rule 60(b) matter was pending before the Second Circuit.[6]

Futerfas "only" represented Mannino while Carnesi was disqualified from the Mannino case based on his own investigation. (A-55) This simply is not true as Futerfas acknowledged and as the docket sheet in the Mannino case establishes without question. Futerfas was co-counsel with Carnesi for Mannino in the Mannino case before, during, and after Carnesi's disqualification. He also represented Carnesi in his efforts to get reinstated and he served as "independent counsel" for Mannino at the *Curcio* hearing regarding his co-counsel Carnesi.

[6]As with many of the substantive facts, the lower court has the chronology of events mixed up as well. The court wrote that the COA application was filed on November 6, 2001 and that oral argument was held on it on January 11, 2002. (A-8). The COA application actually was filed on November 6, 2000 and there was never any oral argument held on it. On January 11, 2002, the court held a brief oral argument on the Rule 60(b) motion; but the COA application was pending for 30 months, without any argument permitted, before a decision was entered. Mr. Stantini, through counsel, tried to get the court to rule on the COA application; but the court ignored our letters, leading Mr. Stantini to file a petition for writ of *mandamus*. It was that filing that led to the court's M&O which, predictably reflected the court's displeasure with the

On February 25, 2003, the undersigned wrote to the district court, advising that the government's only trial witness against Mr. Stantini, "Sammy the Bull" Gravano, had just been charged with the murder of a New York City police detective, alleged to have taken place prior to Mr. Stantini's trial. Mr. Stantini requested a formal inquiry by the court, including an inquiry as to whether government counsel had been aware of this murder from Gravano's reportedly full de-briefings prior to trial, and had knowingly withheld this significant information from Mr. Stantini.[7] On March 3, 2003, the district court summarily denied Mr. Stantini's request and refused to conduct any sort of inquiry into the subject.

Finally, on June 16, 2003, two and one-half years after final briefing on Mr. Stantini's request for a Certificate of Appealability, the district court entered a memorandum and opinion denying the request for a Certificate of Appealability and, in the same order, denying relief under Rule 60(b) (A-3-A-38).

The district court's denial of the COA is filled with basic mistakes regarding the material facts and claims in the case and nowhere in the decision does the court recognize the applicable legal standard for the consideration of a COA. Instead, the court addressed its view of the merits of each issue (after mischaracterizing the issue and the relevant facts) and then denied relief, based on its view of the merits, in direct contravention of the applicable law.

This case raises important and recurring constitutional issues, including issues on which the circuit courts have split. At a minimum, Mr. Stantini deserves to have a COA issued

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mandamus petition and denied all relief.

[7]Significantly for this case, Gravano was de-briefed by the FBI about the Oliveri murder for many months and, notwithstanding his disclosure of all other participants in the murder, Gravano never once mentioned Mr. Stantini as having had anything whatsoever to do with the murder. It was not until an FBI agent suggested to Mr. Gravano that perhaps he had "forgotten" that Mr. Stantini had participated in some way, that Gravano then suddenly "remembered" the same and implicated Mr. Stantini.

so he can fully brief the issues below. The issues more than satisfy the standard this Court has set for the issuance of a Certificate of Appealability. Alternatively, this case should be remanded for further consideration in light of the recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004) which is directly applicable to one issue.

REASONS FOR GRANTING THE PETITION

The trial court's imposition of sentence in this case based on a federal sentencing Guideline that applies exclusively to premeditated murder where the crime of conviction was for a non-premeditated murder and the jury expressly was instructed not to consider premeditation and that it was not an element of the charged offense and where such Guideline language as was relied upon was not even in effect at the time of the alleged offense violates the Fifth and Sixth Amendments to the United States Constitution and the Ex Post Facto Clause of the United States Constitution, is irreconcilable with this Court's jurisprudence, and squarely conflicts with authority from other federal Circuits and with authority from within the Second Circuit itself and involves an important constitutional issue. At a minimum, a remand for further consideration is required in light of this Court's recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573 (June 24, 2004). *See e.g. Ditts v. Oregon*, – U.S. –, 2004 U.S. LEXIS 4584 (June 28, 2004)(granting *certiorari* and remanding for further consideration in light of *Blakely*).

This case presents at least one important constitutional issue on which there is a direct split of authority among the federal circuits and a split of authority within the Second Circuit itself. Additionally, the case raises a most compelling and unprecedented series of conflicts of interests among defense counsel, along with other compelling constitutional issues. To deny a Certificate of Appealability in this case clearly violates the rule established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and renders arbitrary this

important review process, involving the defendant's last meaningful chance for the review of issues of important constitutional and human consequence. The case must be remanded to the Second Circuit for the issuance of a Certificate of Appealability and a full consideration of the underlying merits of the constitutional claims. *See e.g., Tennard v. Dretke*, 542 U.S. –, 2004 U.S. LEXIS 4575 (June 24, 2004)(reversing and remanding where circuit court improperly denied COA under *Miller-El*).

I. IT IS CONSTITUTIONAL ERROR TO SENTENCE A DEFENDANT UNDER A FEDERAL SENTENCING GUIDELINE FOR FIRST DEGREE PREMEDITATED MURDER WHERE THE INDICTMENT CHARGED SECOND DEGREE, NON-PREMEDITATED MURDER AND THE JURY WAS INSTRUCTED ONLY TO CONSIDER SECOND DEGREE MURDER AND NOT TO CONSIDER PREMEDITATION AND IT VIOLATES THE RULE ESTABLISHED IN *MILLER-EL V. COCKRELL*, 537 U.S. 322 (2003) FOR A CIRCUIT COURT TO DENY A CERTIFICATE OF APPEALABILITY WHERE THE DEFENDANT UNDER 28 U.S.C. §2255 HAS RAISED THIS AND OTHER SIGNIFICANT CONSTITUTIONAL ISSUES OVER WHICH THERE IS A DIRECT SPLIT OF AUTHORITY AMONG THE CIRCUITS AND WITHIN THE REVIEWING CIRCUIT ITSELF.

The Legal Standard for a Certificate of Appealability

In considering an Application for a COA, a court must consider and decide separately whether each issue for which the Certificate is sought is appropriate for the issuance of a COA. *Soto v. US*, 185 F.3d 48 (2d Cir. 1999). Only those issues for which the Certificate is issued can be heard on appeal. *Id.*; 28 U.S.C. §§2253(c)(1)(B); (c)(3).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clearly set forth the standard that a court is to apply in considering whether to grant a COA. The Court wrote that a

COA should be issued "where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Miller-El*, 537 U.S. at 336. Under this standard, a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (Citations omitted). A reviewing court should take "an overview" of the claims in the petition and make a "general assessment" of their merit, while asking whether a resolution in the lower court could be "debatable among jurists of reason." *Id.* at 336. The reviewing court simply engages in a "threshold inquiry" which neither requires nor permits a "full consideration of the factual or legal bases adduced in support of the claims." *Id.*

"A COA does not require a showing that the appeal will succeed." *Id.* at 337. Accordingly, "a Court of Appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* It would be wrong for an appellate court to deny a COA, and therefore deny appellate review, because a prisoner "did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Id.* Indeed, "a COA will issue in some instances where that is no certainty of ultimate relief." *Id.*

A claim can be "debatable," as that term is used in this context, "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Finally, the Court wrote that it was error to decide, in effect, the substance of an appeal in the context of considering an application for a COA. Such a manner of proceeding the Court wrote, "undermines the concept of a COA" by making an evaluation of the merits of the substantive issues in a process which should be simply a "threshold inquiry." *Id.* at 342. The question, the Court in *Miller-El* wrote, is the "debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

(Emphasis added)

With respect to each of the issues for which Mr. Stantini sought a Certificate of Appealability, he more than satisfied the legal standard for the issuance of the same. Indeed, with respect to the sentencing issue, where there is a direct split of authority among the federal circuits, uncertainty within the reviewing circuit, and where the underlying decision contravenes authority from this Court, a COA **must** issue by definition, for surely little could more clearly demonstrate that an issue is "debatable among reasonable jurists."

Moreover, each issue involves matters of significant importance which ought to be reviewed by this Court. The underlying Fifth and Sixth Amendment implications of these issues require that this Court be given the opportunity to review the issues. Denying a COA in a case with the number of Constitutional issues present here, while granting one in other cases renders the process impermissibly arbitrary and runs afoul of both the letter and rationale of *Miller-El*.[10]

This principle should, of course, apply with even greater force where, as here, the significant constitutional claims are meritorious and the consequences are grave.

The Sentencing Issue

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[10]*See e.g., Seifert v. Keane*, 74 F. Supp. 2d 199 (E.D.N.Y. 1999) (Certificate of Appealability granted on claim of ineffective assistance of counsel by trial and appellate counsel; "debatable among jurists"); *Ryan v. Mann*, 73 F. Supp. 2d 241 (E.D.N.Y. 1998)(Certificate of Appealability issued, despite finding of clearly no merit on *Bruton* issue); *Slevin v. US*, 71 F. Supp. 2d 348 (S.D.N.Y. 1999)(Certificate of Appealability granted on ineffective assistance of counsel claim despite finding of complete lack of credibility); *Nova v. Bartlett*, 63 F. Supp. 2d 449 (S.D.N.Y. 1999)(Certificate of Appealability granted on ineffective assistance of counsel issue, despite clear rejection of the issue on the merits); *Lainfiesta v. Artuz*, 2000 U.S. Dist. LEXIS 14257 (S.D.N.Y. September 29, 2000)(Certificate of Appealability granted on issue of right to counsel of choice); *Tankleff v. Senkowski*, 135 F.3d 235 (2d Cir. 1998)(Certificate of Probable Cause issued, finding decisions by other courts on the issue equals "debatable among jurists"); *Collins v. Herbert*, 992 F. Supp. 238 (W.D.N.Y. 1997)(COA granted despite finding that claim was procedurally barred).

Mr. Stantini was convicted of violating 18 U.S.C. §§1952B(a)(1) and (a)(5), conspiracy to murder and murder in the May 3, 1988 death of Francesco Oliveri. The underlying charge to which this racketeering murder conspiracy and murder charge referred in the indictment was New York Penal Law §125.25, a non-premeditated murder in the second degree under New York State Law. The jury expressly was instructed to consider only second degree murder and was only instructed on the elements of second degree murder. Furthermore, the jury expressly was instructed that "premeditation" was not an element or prerequisite for them to consider.(Tr. 1230-31) Nevertheless, at sentencing, the District Court imposed sentence under U.S.S.G. §2A1.1, the guideline for first degree murder, which, after a two-level reduction for minor role, resulted in an offense level of 41 and a sentencing range of 324 - 405 months. Mr. Stantini was sentenced to 324 months in prison. Under the applicable Guideline for non-premeditated murder, §2A1.2, the maximum level would have been level 33 (135-168 months) and with the two level reduction for minor role, Mr. Stantini's range could only have been 108-135 months as a matter of law. The sentence imposed is a minimum of 16 years over the maximum authorized by the law, based on the actual crime of conviction and the applicable Guideline in effect.

Mr. Stantini's constitutional rights to a fair jury trial,[11] to effective assistance of counsel,[12] to due process of law,[13] and under the Grand Jury and Ex Post Facto Clauses[14] were violated in connection with his sentencing. Mr. Stantini also

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[11] *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004).

[12] *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Glover v. US*, 531 U.S. 198 (2001); *Jamison v. US*, 4 Fed. Appx. 88 (2d Cir. 2001).

[13] *See e.g., US v. Baker*, 262 F.3d 124 (2d Cir. 2001); *US v. Sullivan*, 242 F.3d 1248 (10th Cir. 2001).

[14] *See e.g., Stogner v. California*, 539 U.S. 607 (2003); *US v. Keigue*, 318 F.3d 437 (2d Cir. 2003).

claims that the sentencing error in this case constitutes plain error requiring reversal.[15]

In arriving at the Guideline to use for sentencing in this case, the Court started out on the right course. It referred first to U.S.S.G. §2E1.3(a)(2) which then referred the Court to the "offense level applicable to the underlying crime or racketeering activity." It is from that point that the Court went wrong in its Guideline selection. The Court turned to U.S.S.G. §2A1.1, the Guideline applicable to first-degree, premeditated murder, rather than §2A1.2, which applies to §1111 non-premeditated murders. *US v. Hanson*, 264 F.3d 988, 996 (10th Cir. 2001)

This was error for several reasons. First, the indictment charged exclusively second degree, non-premeditated murder. Secondly, the court expressly instructed the jury that premeditation was not relevant to their deliberations, not an element of the crime charged, and not to be considered by them. Third, the version of §2A1.1 used by the court in sentencing Mr. Stantini was one which did not even come into effect until November 1, 1990, well after the crime. This last factor will be discussed in a later section of this Petition.

Reasonable Jurists Differ On This Subject

The sharp split of authority among the federal circuits on the question of whether one ever can be sentenced under a Guideline for first degree premeditated murder when the crime of conviction was second degree non-premeditated murder brings this issue squarely within the rule of *Miller-El*, requiring that a COA be issued.

In *US v. Hanson*, 264 F.3d 988 (10th Cir. 2001), the Court was called upon to decide the precise question of whether it is appropriate to sentence a defendant who has been convicted of second degree non-premeditated murder as if he had been convicted of first degree premeditated murder under the federal sentencing guidelines. The Court held that this was not constitutionally permissible. In doing so, the

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[15]*See e.g., US v. Keigue*, 318 F.3d 437 (2d Cir. 2003); *US v. Thomas*, 274 F.3d 655 (2d Cir. 2001)(*en banc*).

Tenth Circuit decided the question in a manner directly in conflict with the Second Circuit and with one half of the judges on the Fourth Circuit, while agreeing with the other half of the judges on the Fourth Circuit. *Compare Hanson* and *US v. Kelly*, 1 F.3d 1137, 1140-41 (10th Cir. 1997) with *US v. Barber*, 119 F.3d 276 (4th Cir. 1997)(*en banc*)(Murnaghan, J., dissenting)(Wilkins, J., dissenting) and *US v. Minicone*, 960 F.2d 1099, 1110-11 (2d Cir.) *cert. denied*, 503 U.S. 950 (1992).[16] The district court's decision

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[16]There is another line of cases in a related area which also highlights the merit in Mr. Stantini's argument. These cases allow the imposition of sentence under §2A1.1 for first degree murder under a felony murder doctrine; but **only** because the Guidelines in effect at the applicable time expressly provide a cross-reference to §2A1.1 if in the course of committing the felony, a death occurs. *See e.g., US v. Weasel Bear*, 356 F.3d 839 (8th Cir. 2004)(applying §2B3.1(c)(1)'s express cross-reference for murder during the commission of a robbery); *US v. Gamez*, 301 F.3d 1138 (9th Cir. 2002)(applying §2D1.1(d)(1)'s cross-reference for murder during the commission of narcotics offense); *US v. Harris*, 238 F.3d 777 (6th Cir. 2001)(applying §2B3.1(c)(1) cross-reference for felony murder); *compare Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002) disallowing capital sentence where indictment did not charge aggravating circumstance). The discussion in the first three of these cases questions whether such cross-references are consistent with the spirit, if not the letter, of *Apprendi*, *see Harris*, 238 F.3d at 779-780 (Merritt, J., dissenting) and they most likely will not be under the letter and spirit of *Blakely*; but at least they are conceptually understandable and are supported both by the well established felony murder doctrine and by a specific cross-reference. Here, there was no question of felony murder; it was strictly non-premeditated second degree murder as the crime charged and of conviction and no basis at all for transmuting that into a premeditated first degree murder. As this Court recently noted, "our Constitution ... do(es) not admit ... that facts are better discovered by judicial inquisition than by adversarial testing before a jury." "The Framers would not have thought it too much to demand that, before depriving a man of (16) more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.'" *Blakely*, 2004 U.S. LEXIS 4573 at *31. Once the district court selected federal murder under 18 U.S.C. §1111 as the federal analog to New York's second degree murder, it should have seen clearly from the statute itself that, other than for felony murder, not at issue here, the statute clearly made premeditated

here makes no reference whatsoever to any of these cases or at all to the split of authority, notwithstanding Mr. Stantini's briefing on each case.

The Court in *Hanson* found it impermissible to impose a sentence for first degree murder on a defendant convicted of second degree murder because the Guidelines themselves drew the distinction specifically based on the factor of premeditation, with that factor serving as the exclusive dividing line between the two for §1111 murders. *Hanson*, 264 F.3d at 995-996. The Court specifically noted the distinction in the context of comparing §§2A1.1 and 2A1.2. *Id.* at 996. Moreover, the Court expressly noted its disagreement with the analysis on this subject employed by Judge Wilkins in the Fourth Circuit in *Barber*.

The purpose here is not to demonstrate which conclusion on this question is the correct one; rather it is simply to show that reasonable jurists have differed and continue to differ over this important question, as reflected by the split of authority among the federal circuits - indeed the 10th and 2nd Circuit positions are irreconcilable - thereby demonstrating by definition the error in denying a COA in this case, under the *Miller-El* standard.

Interestingly, the Second Circuit itself remains uncertain in this area, further satisfying the *Miller-El* standard for a COA. A consideration of *Minicone* and subsequent authority within the Circuit makes the point.

In *Jamison v. US*, 4 Fed. Appx. 88 (2d Cir. 2001), the Second Circuit characterized *Minicone* as standing for the limited proposition that while, in the context of the murder in that specific case, it was not error for the Court to use the §2A1.1 first degree murder Guideline at sentencing, it had

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murder first degree and non-premeditated murder ("any other murder") second degree. Similarly, the Guidelines make it perfectly clear and simple: **premeditated first degree murder under §1111 gets sentenced under §2A1.1 and second degree non-premeditated murder under §1111 (any murder other than felony murder or premeditated murder) gets sentenced under §2A1.2.** The language of §2A1.1 and the proposed 2004 amendments prove the point.

not held that §2A1.1 necessarily was to be the appropriate Guideline where the crime of conviction was for second degree murder. The Court remanded the case for consideration of whether it may have been ineffective assistance of counsel for sentencing counsel to have failed to challenge the use of §2A1.1 instead of §2A1.2. The decision in *Jamison* alone makes it clear that the question Mr. Stantini has raised is at least "debatable" within the reviewing Circuit itself, thereby making the question one which **demands** the issuance of a COA under *Miller-El*. Mr. Stantini has, of course, raised this precise issue - whether his lawyers were ineffective for not objecting to the imposition of sentence based on a Guideline for first degree murder, rather than the Guideline for second degree murder, as well as based on a Guideline not even in effect at the applicable time - along with the substantive issue that the sentence itself was unconstitutional.

Minicone is also distinguishable from the instant case based on the two different statutes charged in the cases. *Minicone*, for instance, was charged with the murder in the context of 18 U.S.C. §1961 *et seq.*; whereas Mr. Stantini was charged under 18 U.S.C. §1952B(a)(1)&(a)(5) (now codified as §1959(a)(1) & (1)(5)) which, in contrast, requires findings of a violation of state or federal law, therefore opening the door to a more careful consideration of the clearly more applicable second degree murder provision under 18 U.S.C. §1111.[17]

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[17] The lower Court attempted to justify its jury instructions by noting that the first degree murder statute under the New York Penal Law clearly would not have applied in this case, and so that is why it instructed the jury exclusively on second degree murder. (A-28) This is a non-issue. The Court instructed the jury on the elements of second degree murder based upon the indictment in the case; moreover, no one has argued or could argue that the New York State first degree murder statute had any applicability to this case in any event. This simply further supports Mr. Stantini's argument that the analogous and appropriate Guideline to use was the Guideline §2A1.2, the Guideline which applies to the second degree murder provision of §1111, a murder of any variety other than a premeditated murder under §1111. In fact, the district court's

The debate within the Second Circuit and the split of authority among other federal circuits in cases post-dating *Minicone* clearly demonstrate the error in denying a COA.

This Court's recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004) makes it clear that the lower court absolutely violated the Sixth Amendment jury trial guarantee by imposing sentence on Mr. Stantini for the crime of first degree premeditated murder when he was charged with and convicted of second degree non-premeditated murder and the jury was instructed to consider only the latter and not to consider the issue of premeditation at all. For these purposes, however, it suffices to rely on the analysis in *Blakely* to demonstrate beyond any question that this issue is at the very minimum one that is debatable among reasonable jurists and therefore requires that a COA be issued. Mr. Stantini respectfully submits that the very least that should occur in this case is that the writ should be granted and the case should be remanded for further consideration by the Second Circuit in light of the decision in *Blakely*.[18]

The sentence imposed in this case also was unlawful

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decision reveals its error; for it knowingly selected a Guideline which required premeditation. (A-29) It seems unable in its decision to understand that reference to §1111 gave the sentencer two choices, §2A1.1 for premeditated murder and §2A1.2 for non-premeditated murder and only the latter could be applied here. *See Hanson, infra.*

[18]Many cases long pre-dating *Blakely* also make the point emphatically that there are Fifth and Sixth Amendment problems with sentencing a defendant under a particular murder Guideline when all of the elements underlying the Guideline were neither charged nor found by the jury. *See e.g., US v. Baker*, 262 F.3d 124, 133 (2d Cir. 2001); *US v. Free*, 841 F.2d 321, 325 (9th Cir.), *cert. denied*, 486 U.S. 1046 (1998); *US v. Bordeaux*, 980 F.2d 534, 536 (8th Cir. 1992). The court's purported reliance on the Assimilative Crimes Act, 18 U.S.C. §13 as justification for choosing first degree murder is completely misguided (even the government disavowed that one at oral argument). This Court's decision in *Lewis v. US*, 523 U.S. 155 (1998) demonstrates the error in choosing first degree murder over non-premeditated second degree murder under the circumstances of this indictment and jury charge. *See also US v. Fortier*, 180 F.3d 1217 (10th Cir. 1999).

because the Court used a formulation of the Guideline that only came into effect after November 1, 1990 (*See* Amendments 310 and 311); whereas, the crime charged occurred on May 3, 1988, over two years before the amended language of §2A1.1 which was used in this case (expanding its coverage), even came into effect. Prior to November 1, 1990, unless a person were convicted of the crime of first degree murder as defined under 18 U.S.C. §1111 (requiring premeditation), only U.S.S.G. §2A1.2 could be applied. This principle applies to both the murder conspiracy and the murder charges.[19]

In *US v. Failla*, this same Eastern District of New York Probation Office expressly wrote that it would create an "Ex Post Facto issue" if a sentence were imposed (where a murder pre-dated November 1, 1990) based on a cross-reference to U.S.S.G. §2A1.1 because the Guidelines were only amended to apply that cross-reference effective November 1, 1990. Accordingly, the Probation Officer noted, the base offense level of 43, applicable under §2A1.1, could not be used as a matter of law. Instead, only §2A1.2, could be used.[20]

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[19]Under U.S.S.G. §1B1.11(b)(1) the sentencing Court must use the Guidelines Manual in effect on the date the offense of conviction was committed, if the use of any other Guideline Manual would result in an increased punishment. This is required under the *Ex Post Facto* Clause. Prior to November 1, 1990, the effective date of Amendment 310 to the Guidelines, a murder had to be "willful, deliberate, malicious, **and** premeditated" to qualify for sentencing under that Guideline. Even after the Amendment's effective date, only a "premeditated" murder or other felony murder (not applicable here) could be sentenced under §2A1.1. Any other murder had to be sentenced under §2A1.2. § 2A2.1, with a base offense level of 20 was the only applicable Guideline for the conspiracy and the district court erred there as well by using a version not in effect at the relevant time.

[20]*See US v. Failla*, Docket No. 93-CR-294 (CPS)(EDNY). Interestingly, both Futerfas and Carnesi and Mr. Stantini's prosecutor were the lawyers in *Failla*; so by the time of Mr. Stantini's sentencing, less than a year later, all were well aware of the issue, yet no one objected to using the wrong Guideline book or a Guideline not in effect at the relevant time. This clearly constituted ineffectiveness and was far

Instead, as the report provided, for a conspiracy to commit murder, cross-reference could only be made to §2A2.1 or §2A1.2 which provide for a base offense level of 20 for a murder conspiracy and 33 for a non-premeditated (second-degree) murder. U.S.S.G. §2A1.1 simply could not be used for a pre-November 1, 1990 murder.

As in *Failla*, §2A1.2 is the Guideline which the Court should have applied to Mr. Stantini as a matter of law. Since the two counts would then be grouped, the higher Guideline Offense Level of 33 would be the applicable level for the greater offense (murder). After taking the two point reduction which the Court found applicable for Mr. Stantini's "minor role" in the crime charged, the maximum sentence that lawfully could have been imposed on him in this case was a sentence in the range of 108 - 135 months (Level 31), a sentence by the way, similar to that which was offered to Mr. Stantini during his trial and afterwards and similar to the sentence received by the defendants in the *Mannino* case who were charged with this same crime and others.

Mr. Stantini further contends that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002) also supports his argument.[21]

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more egregious an error than that which this Court found reversible in *Glover v. US*, 531 U.S. 198, 200 (2001)(ineffectiveness led to error of from 6-21 months - as opposed to over 16 years here). *See also Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003)

[21]Mr. Stantini is aware that this Court has decided that *Ring* does not apply on collateral review. *Schriro v. Summerlin*, 542 U.S. –, 2004 U.S. LEXIS 4574 (June 24, 2004). However, he has argued, *inter alia*, that he should be permitted another opportunity at direct review because of appellate counsel's multiple conflicts of interests. Additionally, it is simply *Ring's* reasoning that he seeks to apply here. Mr. Stantini also has raised a challenge to this sentence also under *Apprendi* and he believes that his analysis under *Apprendi* is correct. However, the Second Circuit's decision in *Coleman* bars a defendant from raising an *Apprendi* claim in a §2255 motion (and, logically, therefore, in a Rule 60(b) motion related to a §2255 proceeding); accordingly, he recognizes that he cannot proceed with the merits of that claim before this Court. Nonetheless, he continues to assert that it was ineffective for his sentencing attorneys to fail to recognize the issue and raise it at

Finally, under the Second Circuit's own analysis in *US v. Keigue*, 318 F.3d 437 (2d Cir. 2003) and in *US v. Thomas*, 274 F.3d 655 (2d Cir. 2001)(*en banc*), the sentencing error in this case constituted plain error as a matter of law.

The district court's decision with respect to the denial of the COA on this issue is virtually meaningless and adds nothing to the discussion. It ignores the actual arguments and most of the submissions made by Mr. Stantini on this issue,[22] ignores the most relevant portions of the jury instructions on which Mr. Stantini's arguments rest,[23] ignores all of the relevant authority from the other circuits and from the Second Circuit (e.g. *Jamison*) that demonstrates the "debatability" of the issue, ignores the conclusion of the Probation Office in another case with the same issues in the same district, and mischaracterizes the arguments that it purports to consider.

Clearly the sentencing issue in this case is one on which a COA had to be issued as a matter of law.

Outrageous Conflicts and Other Issues for Which a COA Should Have Been Issued

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sentencing and on direct appeal and he clearly has been prejudiced by this error. *See Glover v. US*, 531 U.S. 198 (2001); *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003).

[22]For example, the lower court goes on at great length in asserting that a flaw in Mr. Stantini's argument is that he purportedly only focused on the conspiracy charge and not on the murder charge in his analysis. (A-31-A-33). This is absolutely wrong. As with most of the issues, the court appears simply to have ignored Mr. Stantini's submissions entirely and relied exclusively on the government's mistaken characterization of those submissions. This is a subject on which we specifically and at length disabused the court of because the government had made this claim; yet Mr. Stantini's correction is ignored entirely.

[23]For example, the court ignores entirely the portions of the jury instructions during which it expressly instructed the jury that it should only consider "murder in the second degree" and then instructed the jury exclusively on the elements of "second degree murder." (Tr. 1230-31). The court further ignores its express instruction to the jury that "premeditation" was not an element or a "prerequisite" to a finding of guilt in the case. (Tr. 1230).

Mr. Stantini claims that he was denied his 5th and 6th Amendment rights to due process, to a fair trial, to confrontation, and to the effective assistance of counsel based on multiple conflicts of interests[24] which attended the representation he received at trial, post-trial, at sentencing, and on appeal, and on otherwise ineffective conduct as more specifically identified below. He also claims that he was entitled to discovery and a full evidentiary hearing in connection with the claims. His claims are supported by his own affidavits, affidavits of counsel, and the undersigned's affirmation, based on interviews with previous conflicted counsel, both of whom were prepared to testify under oath at a hearing.

The conduct of the attorneys at issue includes Carnesi's performance at trial, and specifically, his conduct with respect to plea negotiations during the trial [25] and his failure

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[24] The conflicts were: Carnesi simultaneously represented Mannino who was charged with the same crime as Mr. Stantini. The adverse effects from this dual representation were, inter alia, the improper advice Carnesi gave to Stantini regarding a plea offer that was made during trial, his ethical inability to put on evidence exculpating Stantini while inculpating Mannino, and currying favor. Futerfas was then retained by Stantini for the purpose of raising the conflict claim about Carnesi's dual representation. In the §2255 investigation we learned that Carnesi had additional conflicts: he had been disqualified from Mannino's case because he was under investigation for involvement in his client's crimes; Carnesi also represented a defendant, Erasmo Gambino, who was implicated in another Gravano murder never before disclosed. Most shockingly, we learned: Futerfas suffered from the exact same dual representation conflict as Carnesi; he was co-counsel with Carnesi for Mannino. Futerfas also represented Carnesi in the case. All was concealed from Stantini. Additional ineffectiveness was Futerfas's failure to follow Stantini's wishes in accepting a plea deal offered during the post-trial proceedings and the failure to object to sentencing Guideline not in effect at the applicable time, leading to a sentence of over 16 extra years.

[25] Specifically, among other errors, Mr. Carnesi failed to properly advised Mr. Stantini with respect to a plea offer of ten years made by the government during the trial. Knowing that Mr. Stantini's perceived impediment to taking the plea deal that was offered was his concern over the effect it could have on another of Mr. Carnesi's clients, Lorenzo

to properly examine and call witnesses and put forward a theory of defense that would have conflicted with his duty to another client he was simultaneously representing, Lorenzo Mannino. Mr. Stantini has alleged that Mr. Carnesi's representation was attended by various conflicts of interests, including those arising from his joint representation of Mr. Stantini and Mr. Mannino and his own criminal investigation, arising from conduct related to the conduct charged in the indictment facing Mr. Mannino and with this group of defendants, all of which was undisclosed to Mr. Stantini.[26]

Mannino, Mr. Carnesi, nevertheless, failed to advise Mr. Stantini that Mr. Mannino already had decided to plead guilty himself, and that he (Stantini) must act in his own best interests. This issue is especially appropriate for a Certificate of Appealability in light of recent authority emphasizing the importance of plea negotiations in the assistance provided by counsel. *See e.g., US v. Williams*, 2004 U.S. App. LEXIS 11434 (2d Cir., June 10, 2004); *US v. Moody*, 206 F.3d 609 (6th Cir. 2000); *US v. Christakis*, 238 F.3d 1164, 1171 (9th Cir. 2001); *US v. Fernandez*, 2000 U.S. Dist. LEXIS 5721 (S.D.N.Y. May 3, 2000), *reconsideration denied, US v. Fernandez*, 2000 U.S. Dist. LEXIS 8653 (S.D.N.Y. June 22, 2000)(ineffective assistance of counsel for failure to advise defendant to cooperate and based on conflict of interest from multiple representation); *Boria v. Keane*, 83 F.3d 48, 51 (2d Cir. 1996), *rehearing*, 90 F.3d 36 (2d Cir. 1996); Kate Stith and Jose A. Cabranes, *Fear of Judging* 130 (1998)(Plea bargaining is central to criminal law).

[26]At A-67, the Court characterizes Carnesi's criminal troubles as having "been terminated before the proceedings against Stantini had even begun." That simply is not accurate; unless the Court means to exclude from "proceedings" Mr. Stantini's pre-trial period, often referred to as the most important stage of a criminal case. *See e.g., Moran v. Burbine*, 475 U.S. 412, 431 (1986)(the guarantee of effective assistance of counsel must be fulfilled from the very initiation of the criminal process); *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993); Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1988) at §106, cited with approval in *US v. Gordon*, 156 F. 3d 376, 390 n.12 (2d Cir. 1998); *Boria v. Keane*, 99 F. 3d 492, 496-97 (2d Cir. 1996).

Additionally, while the Court accurately notes at A-67 that Carnesi was reinstated by Judge Leisure, it is relevant to note further that Judge Leisure required *Curcio* hearing and that Mr. Mannino's *Curcio/Iorizzo* counsel was hardly "independent" in advising him to waive the conflict. To the extent the Court relied on its conclusion that the conflict was

Mr. Stantini's allegations of ineffective assistance of post-trial and appellate counsel by Mr. Futerfas are also based on various conflicts of interests, including the facts that, despite being retained to litigate the issue of Carnesi's conflicts of interests flowing from Carnesi's joint representation of Mannino and Stantini, Futerfas **also** represented Mannino, both for purposes of filing his motions and as "independent counsel" advising him regarding Carnesi's conflicts.[27]

A common theme in the lower court's decisions is the complaint that the case raises purportedly rehashed claims. (E.g. A-14-A-19) This claim simply is not true; nor could it possibly be true. Again, the lower court got mixed up with its facts and got them totally wrong.

Clearly, the claims regarding Futerfas's conflicts and ineffective assistance of counsel are not repeat claims; indeed, they were not even known by Mr. Stantini and could not have been raised before since Futerfas was the previous lawyer in the case and handled the direct appeal.

It is the claims regarding Futerfas that led to the

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meaningless because Carnesi purportedly knew that he had no exposure to prosecution before Stantini's trial began [A-63], this suffers from a number of defects. It ignores authority from such cases as *US v. Fulton*, 5 F.3d 605 (2d Cir. 1993); Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988); *Gov't of the Virgin Islands v. Zepp*, 748 F.2d 125, 134 (3d Cir. 1984)(Higginbotham, J.) which focus on the conflict that arises simply from the accusation, whether or not resulting in prosecution, it further ignores the importance of Stantini's pre-trial stage, and finally, it fails to recognize the relevance to Mr. Stantini of just how Mr. Carnesi's own problems were resolved. This, of course, the district court foreclosed us from proving by denying discovery and a hearing.

[27]The district court characterized Stantini's complaint regarding Futerfas's representation of Mannino as being a complaint that Futerfas represented Mannino "during the period of Carnesi's temporary disqualification from that case." [A-55]. The district court was wrong. In fact, as the record clearly establishes, Futerfas represented Mannino before, during, and after Carnesi's disqualification and reinstatement and he represented Mannino as his attorney and as "independent" conflict counsel regarding the waiver of Carnesi's conflicts. Of course, Futerfas also represented Carnesi in connection with his efforts to get reinstated into the case.

reiteration of certain claims regarding Carnesi; for, as the lower court appears to have recognized, one of Mr. Stantini's claims is that Futerfas did not effectively raise the claims about Carnesi the first time around because of his conflicts, and so they must be raised again. Other claims about Carnesi never were raised before.[28] The district court mistakenly dismissed the claims as just "another fruitless motion for collateral relief brought upon grounds that have been advanced before and rejected at every level of the federal judiciary ..." [A-81][29]

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[28]Mr. Stantini has alleged several adverse effects from conflicts, including losing open plea offers for far lesser sentences, made to both Carnesi and to Futerfas; losing a defense theory that Carnesi ethically was prohibited from pursuing because of divergent interests; having the post-trial issue regarding Carnesi ineffectively raised and supported by Futerfas because of his divergent interests, losing the chance to raise additional conflict issues earlier in the case, a wholesale failure at sentencing, resulting in a sentence over 3 times as long as could have been imposed under the applicable Guidelines (and a failure to raise the same on appeal), and more.

[29]Unfortunately, the lower court, perhaps inadvertently because of a mix-up over the facts, has misstated material facts and legal claims throughout its decisions. For example, in its June 16, 2003 decision denying the COA application, it wrote that the Second Circuit (in the context of the direct appeal) "discussed at length" "the relationship between Carnesi, Stantini and Alan Futerfas." (A-14) That simply is not true; yet it is repeated at A-18 and reference to the Court of Appeals decision is made in support of the lower court's decision not to give an evidentiary hearing. A-18 This is absurd. The claims are completely new here and the single original claim now has evidentiary support from the affidavits. None of the facts raised about the relationship between Carnesi and Futerfas were even known until after this §2255 motion was filed. Similarly, the lower court wrote at the same page of this M&O that "Each and every argument advanced by Stantini in support of his claim that Carnesi was conflicted and thereby ineffective was carefully analyzed by [the Court of Appeals in the direct appeal]" Again, this is absolutely untrue. One of the central arguments raised in the §2255 motion is that Futerfas never raised (or disclosed) Carnesi's conflict arising from his own criminal investigation and the relationship between Carnesi and Futerfas similarly was never before even disclosed or discovered, let alone litigated. It is hard to see how, in good faith, the lower court made these fundamental errors. A list of the lower court's

Mr. Stantini sought the COA on his ineffective assistance of counsel claims in their entirety. There are many subparts to the overall issue (e.g.(1) Whether the Court applied the proper legal standard - *Strickland* - rather than a modified approach (*Cuyler*) reflecting the conflict nature of the ineffectiveness claims, *see Riggs v. US*, 209 F.3d 828, 832, n.9 (6th Cir.), *cert. denied*, 2000 U.S. LEXIS 6020 (2000); *US v. Gonzalez*, 105 F. Supp. 2d 220 (S.D.N.Y. 2000)(disqualifying counsel for conflict); *Mountjoy v. Cunningham*, 2000 U.S. Dist. LEXIS 7212, *22-*27 (D. N.H., May 11, 2000); (2) Whether the Court properly evaluated what it knew about the joint representation type of conflict vis a vis the standard for disqualification. *US v. Rogers*, 209 F.3d 139 (2d Cir. 2000); (3) Whether the Court failed to evaluate and factor in the failure of the government to fulfill its independent disclosure duty regarding the conflicts, *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *US v.*

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factual errors and mistaken premises for its conclusions could go on and on if there were no limitation on space here; however, at least one other must be noted. It is perhaps as difficult to understand as any.

At A-19, the district court writes that the "claimed conflict of Futerfas was argued once again, this time on behalf of Stantini by new counsel and once again rejected ...." It is impossible to know what on earth the district court is writing about here. Clearly a conflict claim about Futerfas **never** before was nor could have been raised in this case for obvious reasons. His conflicts were only were discovered in the context of the §2255 litigation and he was the counsel of record before this §2255 litigation and he certainly could not and did not raise his own conflicts. In fact, he concealed them from everyone. This Court cannot and must not credit a decision by the lower court based so fundamentally on mistakes of critically important material facts. Moreover, this forum (the §2255 litigation) clearly is the appropriate one to raise and fully develop these vitally important constitutional claims, with an opportunity for a full and fair hearing at which all relevant evidence can be adduced. *See Massaro v. US*, 538 U.S. 500 (2003). The lower court's denial of the COA application was based virtually entirely, not only on a mistaken understanding of the legal standard for granting a COA, but fundamentally on wholly mistaken factual premises and that can be permitted. Mr. Stantini's right to this Court's review of his fundamental constitutional trial rights is far too important to have it denied in this manner or at all.

Malpiedi, 62 F.3d 465, 470 & n.3 (2d Cir. 1995); *Ciak v. US*, 59 F.3d 296, 306, n.8 (2d Cir. 1995); *US v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994); *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992); *US v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991), etc.); *US v. Harris*, 864 F. Supp. 121, 132 (D.DC 1994); etc.); however, the court should have certified the claims of ineffectiveness *in toto*.

Mr. Stantini requested an evidentiary hearing on the issues raised in his motion. The Court flatly denied this request and refused to provide him with the opportunity either for an evidentiary hearing or oral argument on the motion. It is impossible objectively to reconcile the Court's refusal to provide an evidentiary hearing in this case with the jurisprudence on the subject from the Second Circuit [30] or even from this district court [31], rendering the COA process

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[30] *See, e.g., Armienti v. US*, 2000 U.S. App. LEXIS 26070 (2d Cir., October 17, 2000) (Vacating and remanding §2255 motion to require evidentiary hearing on conflict of interest claims); *Amiel v. US*, 209 F.3d 195 (2d Cir. 2000) (Vacating and remanding for evidentiary hearing and reconsideration denial of ineffective assistance of counsel/conflict of interest claims without evidentiary hearing); *US v. Leone*, 215 F.3d 253 (2d Cir. 2000)(remanding for evidentiary hearing on conflict claim); *US v. Carmichael*, 216 F.3d 224 (2d Cir. 2000)(remand for resentencing due to ineffective assistance of counsel); *US v. Duran-Benitez*, 110 F. Supp. 2d 133, 152-57 (E.D.N.Y. 2000)(evidentiary hearing and relief on ineffective assistance/conflict claim). *See also, Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003)(evidentiary hearing required on appellate ineffectiveness claim); *Dabelko v. US*, 2000 U.S. App. LEXIS 9633 (6th Cir. May 3, 2000) (Vacating and remanding denial of §2255 motion and requiring evidentiary hearing on ineffective assistance of counsel/conflict of interest claim).

[31] *See Lloyd v. US*, 2000 U.S. Dist. LEXIS 8365 (E.D.N.Y. May 18, 2000) (Glasser, J.) (Solicitation by the Court of input, including live testimony, from attorney whose assistance was alleged to be ineffective); *see also Chang v. US*, 250 F.3d 79 (2d Cir. 2001), in which this Court, citing *Armienti* found that an evidentiary hearing is required for such claims as these, permitted Judge Glasser to satisfy that requirement by reviewing the affidavit of counsel who was the subject of the conflict claim. In Mr. Stantini's claim, the affidavits of counsel fully support Mr. Stantini's claims and his claims are factually uncontroverted by any competent evidence; *Samper v. Greiner*, 2003 U.S. App. LEXIS 16624

impermissibly arbitrary. The record in this case required full development of the unprecedented multiple conflicts of interests and ineffectiveness through an evidentiary hearing and this §2255 motion was the appropriate vehicle. *Massaro v. US*, 538 U.S. 500, 504-506 (2003).

The number, kind, and complexity of the conflicts of interests alleged and supported by unassailable facts in the instant case absolutely required an evidentiary hearing, both for the expansion of the record so that it could more fully and fairly reflect what actually occurred with respect to these conflicts and to firmly establish facts in dispute from the supporting materials filed by both sides in connection with the motion. This is especially so here, where both conflicted attorneys agreed to testify truthfully if a hearing were granted.

Brady/Kyles Violations and Evidentiary Hearing

Mr. Stantini claims that he was denied important *Brady/Kyles* material in this case and that his right to due process of law, fair trial rights, and right to effective assistance of counsel, and to confront witnesses against him under the Fifth and Sixth Amendments to the United States Constitution were violated as a consequence.

When the case was first filed, the claim was focused on an excerpt from Gravano's biography, in which, for the first time, he disclosed that he had a secret deal or "understanding" with his lead prosecutor, to the effect that he would never have to testify against any member of his "crew." In order to effectuate this, the government would insure that no member of his crew got indicted during the period of time in which he was committed to testify.

Clearly, as Carnesi acknowledged, this was material information never before disclosed or known to the defense and would have been critically valuable at trial. Such a deal readily would have given rise to a defense theory that

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(2d Cir., August 13, 2003)(vacating and remanding denial of ineffectiveness claim without a hearing or at least without the solicitation of testimony from counsel).

Gravano committed this murder with his crew and now just laid it off on others to protect his crew members.

This was, from the start a most dubious case against Mr. Stantini in any event. Gravano had been debriefed for many months about this murder and he had admitted to committing it with others, providing every last detail - except that he never once mentioned Mr. Stantini as a participant until, after several months, an FBI agent came to him and suggested that maybe he had forgotten that Stantini was with them too.

As the §2255 investigation continued, other important *Brady/Kyles* claims developed. These included: (1) evidence that Gravano likely had committed at least one more murder than he had admitted to (Inzerillo); but Carnesi had been restricted in going after it because of his attorney-client relationship with an alleged co-conspirator of Gravano's in the murder (Erasmo Gambino): (2) Evidence that while in the Witness Protection Program, Gravano was recorded telling other witnesses how to lie at trial and how to "play the game" with the government by telling them what they wanted to hear, etc. The court was provided with newspaper reports detailing it all; (3) Gravano's indictment in New Jersey for the murder of a New York City police officer never before disclosed to this or any other defendant. Mr. Stantini made detailed submissions on each of these material issues and requested a full inquiry and hearing on each of them. The lower court either ignored or denied each request out of hand, without any inquiry whatsoever. Discovery on what the government knew about Gravano's perjury and material omissions was essential. The movants sought specific discovery in this case on the substantive issues raised in the case and on the question of the court's disqualification for judicial bias (this was ignored altogether). The lower court simply denied the request for discovery at A-50-A-53.

The inferences flowing from the allegations Mr. Stantini has made, if credited, would entitle him to relief under §2255, and therefore, must be found to serve as "good

cause" for discovery in this case under the standard set out in *Bracy v. Gramley*, 520 U.S. 899 (1997). Mr. Stantini based his argument not just on Rule 6(a) of the Rules Governing § 2255 Proceedings; but on the Due Process Clause and on the Sixth Amendment; for only through discovery can he fully and fairly litigate his claims of judicial bias and ineffective assistance of counsel, as well as his *Brady* claims.

The district court's whole approach to this case was inconsistent even with the Second Circuit's jurisprudence requiring that all criminal defendants be given at least one full and fair opportunity adequately to litigate their legitimate issues. *See e.g., US v. Ching*, 298 F.3d 174 (2d Cir. 2002); *Littlejohn v. Artuz*, 271 F.3d 360 (2d Cir. 2001); *Fama v. Comm'r of Corr. Serv.*, 235 F.3d 804 (2d Cir. 2000).

The district court's decision at A-39-A-82, addresses in summary fashion only one of the several *Brady/Kyles* issues raised and gives no clue as to how the court arrived at its conclusion that the question of further inquiry into these material facts could not be the subject of differences among reasonable jurists. Mr. Stantini had a right to the material information that he has cited and he must be permitted to pursue the enforcement of his related constitutional rights. He was entitled to a full hearing and the full litigation of these claims. There are fundamentally important 5th and 6th Amendment rights at stake here and Mr. Stantini must be permitted to pursue them.

CONCLUSION

A writ of certiorari should be granted and this Court should review and reverse the decision below. Alternatively, the case should be remanded for consideration in light of *Blakely*.

Respectfully submitted,

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